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No. 02-1520

IN THE
Supreme Court of the United States

CHARLES H. BEHLEN, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

MERRILL LYNCH & CO., INC., AND
PHOENIX INVESTMENT PARTNERS, LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENT MERRILL LYNCH & CO., INC., IN OPPOSITION

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May 16, 2003

QUESTIONS PRESENTED

The Securities Litigation Uniform Standards Act of 1998 ("SLUSA") requires dismissal of any state statutory or common-law class action alleging "an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security," 15 U.S.C. § 77p(b)(1), and also permits removal of any covered class action to federal court from state court, *id.* § 77p(c). In the decision below, the Eleventh Circuit affirmed the dismissal of plaintiff's state-law class action complaint pursuant to SLUSA. The issues raised in the petition for a writ of certiorari are:

1. Whether state-law causes of action are subject to dismissal under SLUSA when they involve an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security.

2. Whether, consistent with 15 U.S.C. § 77p(c)'s express removal authorization, defendants may remove to federal court a state-law suit for securities fraud.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Merrill Lynch & Co., Inc., states the following:

Merrill Lynch & Co., Inc., a Delaware corporation, has no parent company, and no publicly owned company owns 10% or more of its stock.

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BRIEF FOR RESPONDENT MERRILL LYNCH & CO., INC., IN OPPOSITION

INTRODUCTION

This case involves the routine dismissal of a state-law class-action lawsuit for securities fraud pursuant to the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227 (codified in part at 15 U.S.C. §§ 77p, 78bb), which prohibits the maintenance of any covered class action "based upon the statutory or common law of any State" by any party alleging "an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security." 15 U.S.C. § 77p(b)(1).

Petitioner Charles Behlen asserts that, if he and a class of similarly situated persons had been better informed, they would have purchased Class A shares of the Phoenix-Engemann Aggressive Growth Fund instead of the Class

B shares that they in fact purchased. He therefore brought a class action against his brokerage firm and the investment adviser of the fund for wrongful conduct (including misrepresentations and omissions) in connection with the sale of Class B, as opposed to Class A, shares.

Rather than bringing a claim for securities fraud under federal law, which would have required him to fulfill the heightened pleading standards imposed by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737 (codified in part at 15 U.S.C. §§ 77z-1, 78u-4), petitioner chose to pursue his class action in state court under state law. But Congress enacted SLUSA precisely to foreclose that type of end-run around the requirements of the PSLRA. Accordingly, respondents Merrill Lynch & Co., Inc. ("Merrill Lynch") and Phoenix Investment Partners, Ltd. ("Phoenix Investment") removed the case to federal court, where the district court dismissed the case in its entirety pursuant to SLUSA.

In affirming, the Eleventh Circuit did not bring itself into conflict with *Falkowski v. Imation Corp.*, 309 F.3d 1123 (2002), *opinion amended*, 320 F.3d 905 (9th Cir. 2003), as petitioner erroneously asserts. The court below did not perceive a conflict with the Ninth Circuit and there is none. *Falkowski* involved a quite distinctive situation where the state claims held to have survived SLUSA dismissal did not concern misrepresentations in connection with the sale of securities, which the court below expressly found was the case here. Petitioner also requests that this case be held for *Breuer v. Jim's Concrete of Brevard, Inc.*, No. 02-337. But that case involves a different statute, the Fair Labor Standards Act of 1938, and a different procedural issue. Further review is plainly unwarranted.

STATEMENT

1. In 1995, to curtail the filing of meritless securities fraud class actions, Congress passed the PSLRA, which instituted heightened procedural and substantive standards for private securities suits in federal courts. The PSLRA imposed heightened pleading requirements and an automatic stay of discovery pending motions to dismiss. 15 U.S.C. §§ 77z-1, 78u-4. *See also* Pet. App. A5-A6; *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 107 (2d Cir. 2001).

By 1998, however, it became apparent to Congress that many class-action plaintiffs were seeking to thwart the PSLRA's heightened pleading requirements by filing frivolous securities lawsuits in state court and under state statutory or common law rather than federal law. To prevent such efforts to circumvent the PSLRA, Congress enacted SLUSA, which forecloses the option of maintaining securities class actions in state court or under state law. *See* H.R. Conf. Rep. No. 105-803, at 13-15 (1998); Pet. App. A7-A9; *Lander*, 251 F.3d at 107-08.

In enacting SLUSA, Congress expressly found that "a number of securities class action lawsuits have shifted from Federal to State courts," and that "this shift has prevented [the PSLRA] from fully achieving its objectives." SLUSA § 2(1)-(3), 112 Stat. 3227, reprinted at 15 U.S.C. § 78a note. Congress concluded that, "to prevent [these] State private securities class action lawsuits ... from being used to frustrate the objectives of the [PSLRA], it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, while ... not changing the current treatment of individual lawsuits." *Id.* § 2(5), 112 Stat. 3227, reprinted at 15 U.S.C. § 78a note.

The general preemption provision of SLUSA therefore broadly precludes class actions under state law where they allege facts actionable under the federal securities laws:

> **(b) Class action limitations**
>
> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –
>
> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 77p(b); *see also id.* § 78bb(f)(1). To provide a ready means for defendants to enforce that prohibition on lawsuits attempting to use state-law causes of action to evade federal restrictions, Congress provided that "[a]ny covered class action brought in any State court involving a covered security . . . shall be removable to the Federal district court for the district in which the action is pending." *Id.* § 77p(c); *see also id.* § 78bb(f)(2).

SLUSA defines "covered class action," in relevant part, as "any single lawsuit in which"

> (I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or
>
> (II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members[.]

Id. §§ 77p(f)(2)(A)(i), 78bb(f)(5)(B)(i). The definition of "covered security" includes "a security issued by an investment company that is registered, or that has filed a registration statement, under the Investment Company Act of 1940." *Id.* § 77r(b)(2).

Taken together, these SLUSA provisions authorize the removal and subsequent dismissal of (1) any "covered class action," (2) based on state law, (3) that alleges an untrue statement, omission of material fact, or deception "in connection with" the purchase or sale of (4) a "covered security." *See* Pet. App. A9; *Green v. Ameritrade, Inc.*, 279 F.3d 590, 596 (8th Cir. 2002).

2. In 1999 and 2000, petitioner purchased Class B shares in the Phoenix-Engemann Aggressive Growth Fund from respondents Merrill Lynch and Phoenix Investment. On March 15, 2001, petitioner filed a civil action in state court, on behalf of himself and a class of persons similarly situated, seeking to recover money damages resulting from the purchase of those shares. The gravamen of the complaint was that respondents sold the class members Class B shares rather than Class A shares (which the class members were eligible to purchase) because the Class B shares were subject to higher fees and commissions.

On April 27, 2001, respondents removed the case to the United States District Court for the Southern District of Alabama. *See* Pet. App. A3. When respondents thereafter moved to dismiss the complaint under SLUSA, petitioner filed an amended complaint from which he deleted the claims for misrepresentation and suppression as well as any explicit references to fraud. Petitioner argued that SLUSA was not applicable to the claims in his amended complaint and sought a remand to state court.

The district court rejected petitioner's arguments. The court observed that, although petitioner attempted to characterize his claim as concerning the overcharging of commissions rather than the sale of securities, the alleged

wrongdoing was nevertheless "in connection with" the sale of covered securities because

> the heart of Plaintiff's claim is that he did not get the shares that he now believes that he should have received. Behlen repeatedly states that he should have been purchasing Class A shares rather than the Class B shares because he could have acquired them and paid less money for fees and commissions.

Id. at A27. Accordingly, the district court denied the remand, dismissed the class claims with prejudice, and dismissed petitioner's individual claims without prejudice.

3. The Eleventh Circuit affirmed. That court agreed with the district court that the allegations in the complaint concerned misrepresentations or omissions "in connection with" the sale of securities:

> [A]lthough Behlen argues that the excess fees and commissions paid by the class members were incidental to the sale of the securities, it seems certain that the very reason they were sold the Class B shares was *because* those shares were subject to the excess fees and commissions. Thus, the fees and commissions were not incidental to the sale of the securities, but were an integral part of the transactions.

Pet. App. A14. The court of appeals also agreed that SLUSA applied to petitioner's amended complaint (despite the absence of explicit references to fraud) because all of the claims therein turned on misrepresentations, omissions, or manipulation "in connection with" the sale of covered securities:

> In the amended complaint, Behlen alleged that "Defendants wrongfully sold Plaintiff and the Class, or wrongfully allowed Plaintiff and the Class to purchase, Class B shares in a mutual fund which allowed Defendants to collect higher fees." Thus, Behlen alleged wrongful conduct "in

> connection with" the purchase of the growth fund shares. He also implicitly alleged that the defendants failed to disclose material facts about which class of shares was sold to him and the class. Because Behlen alleged in the amended complaint that the defendants misstated or omitted material facts "in connection with" the purchase and sale of the growth fund shares, it, too, fell within the scope of the SLUSA and the district court did not err when it denied Behlen's motion to remand the case to state court.

Id. at A17.

The Eleventh Circuit also rejected petitioner's argument that the case was not a covered class action because the class had not yet been certified. The court found it "clear from the statutory language that prospective class actions are removable to federal court even if the state court has not determined whether the action should go forward as a class action." *Id.* at A10 (discussing 15 U.S.C. §§ 77p(f)(2)(A)(i)(I), 78bb(f)(5)(B)(i)(I)). The court also explained that "requiring certification prior to removal would frustrate the objectives of the SLUSA rather than further them" because "SLUSA's provisions were designed to enable securities defendants to obtain early dismissal of frivolous class actions, and thereby avoid the high expense of discovery." *Id.* at A11 (internal quotation marks omitted). Petitioner's proposed rule preventing removal until the class has been certified, by contrast, would expose defendants to "lengthy and expensive pretrial practice and discovery in state court, regardless of the merits of the action." *Id.*

The Eleventh Circuit denied petitioner's en banc petition without dissent or recorded vote in favor of rehearing.

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit properly applied SLUSA to hold that petitioner's lawsuit must be dismissed in its entirety. Petitioner's assertion of a conflict between the decision below and *Falkowski v. Imation Corp.*, 309 F.3d 1123 (2002), *opinion amended*, 320 F.3d 905 (9th Cir. 2003), is incorrect. In *Falkowski*, the Ninth Circuit held that SLUSA does not require dismissal of those counts in a complaint that do *not* depend upon wrongful conduct in connection with the sale of a covered security. In the decision below, however, the Eleventh Circuit construed *all* of the claims in petitioner's complaint as involving wrongful conduct in the sale of covered securities (and thus falling within the ambit of SLUSA). To the extent petitioner challenges the Eleventh Circuit's construction of the particular allegations in his complaint, that contention does not involve an issue involving the interpretation of SLUSA, but rather an assertion that the court below misunderstood petitioner's claims. Such a fact-bound determination, however, does not warrant further review.

II. Petitioner's second issue likewise does not merit certiorari. Petitioner contends that SLUSA § 77p(b) does not provide a basis for removal jurisdiction under 28 U.S.C. § 1441. In making that argument, petitioner does not address the court of appeals' reliance on the specific provision of SLUSA that supports removal, § 77p(c). Thus, even if there were any merit to petitioner's argument, the question presented is completely academic and irrelevant. A court need not strain to construe § 77p(b) and 28 U.S.C. § 1441 in such a way as to support removal jurisdiction when § 77p(c) specifically provides for removal of actions covered by SLUSA. Nor need this petition be held for this Court's decision in *Breuer v. Jim's Concrete of Brevard, Inc.*, No. 02-337, because that case involves the very different question whether an action that may be "maintained" in state court under the Fair Labor Standards Act is subject to removal to federal court. By contrast, petitioner here asserts that SLUSA's prohibition on suits

being "maintained" under state law or in state courts does not support a conclusion of federal preemption that would support removal. Because the cases involve different statutes and different legal theories, this Court's decision in *Breuer* should have no bearing on this case.

I. THE PETITION DOES NOT DEMONSTRATE ANY CONFLICT AMONG THE CIRCUITS ON WHETHER SLUSA REQUIRES DISMISSAL OF CLAIMS THAT DO NOT CONCERN WRONGDOING "IN CONNECTION WITH" THE SALE OF A COVERED SECURITY

A. The Court Of Appeals Correctly Ruled That SLUSA Requires Dismissal Of Petitioner's Claims

Under the plain language of SLUSA, "[n]o covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging . . . an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security." 15 U.S.C. § 77p(b)(1).

The Eleventh Circuit properly applied that language to hold that petitioner's lawsuit must be dismissed in its entirety. All of petitioner's claims are predicated on the theory that respondents wrongfully sold him Class B shares in the Phoenix-Engemann Aggressive Growth Fund instead of Class A shares that would have resulted in lower fees and commissions. Even after amending his complaint, the basis for petitioner's class claims was that "Defendants wrongfully sold Plaintiff and the Class, or wrongfully allowed Plaintiff and the Class to purchase, Class B shares in a mutual fund which allowed Defendants to collect higher fees." Pet. App. A17 (quoting amended complaint). Thus, as the court properly concluded, petitioner alleged wrongful conduct "'in connection with' the purchase of the growth fund shares" within the meaning of SLUSA, § 77p(b). *Id.* Dismissal of the action was therefore entirely warranted.

B. The Decision Below Does Not Conflict With The Ninth Circuit's Decision In *Falkowski*

Petitioner's contention that the decision below conflicts with *Falkowski v. Imation Corp.* has no merit.

1. In *Falkowski*, the Ninth Circuit applied SLUSA to dismiss those claims in the complaint that alleged wrongdoing "in connection with" the sale of a covered security while allowing other claims that did not involve such wrongdoing to proceed. Petitioner incorrectly characterizes the Eleventh Circuit's decision below as holding that SLUSA requires dismissal of *all* claims in a complaint, regardless of whether the claim alleges wrongdoing "in connection with" the sale of a covered security. Rather, the court determined that all of petitioner's claims in fact alleged wrongdoing in connection with the purchase or sale of a covered security and that SLUSA therefore applied to the entirety of petitioner's suit, even as amended. "It is clear," the court said, "that the crux of the complaint was that the defendants either misrepresented or omitted crucial facts about the Class A and Class B shares, thus causing [petitioner] and the class to invest in inappropriate securities." Pet. App. A13.[1] The court made that statement specifically to distinguish this case from *Green v. Ameritrade, Inc.*, 279 F.3d 590, 597 (8th Cir. 2002), which (like *Falkowski*) contained causes of action that did *not* depend upon fraud or deception "in connection with" the sale of a covered security.[2] Hence, even if the circuits

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[1] The court of appeals' conclusion that all of the claims – even the putatively non-fraud claims – must be dismissed also finds support in the definition of "covered class action," which specifies that the action be "any single lawsuit." *See* 15 U.S.C. § 77p(f)(2)(A)(i)(I). The prohibition in § 77p(b) makes clear that "[n]o covered class action . . . may be maintained in any State or Federal court." *Id.* § 77p(b). Thus, once a court determines that the definition of "covered class action" is satisfied, the prohibitions in § 77p(b) apply.

[2] Plaintiff Green had contracted with Ameritrade to receive "real time" stock quotes that turned out not to be in real time. Pet. App. A12 (citing *Green*, 279 F.3d at 593-94). Green did not claim that the delayed quotes caused him to buy or sell a covered security; instead, he

were in conflict over whether SLUSA necessarily requires dismissal of all claims in a complaint – and they are not – any such split would not be implicated by this case.

2. A comparison of the causes of action in *Falkowski* with those in this case confirms that the alleged conflict is illusory. In *Falkowski*, a group of employees that was initially employed by a company called Cemax received options on Imation stock when Imation acquired Cemax. Shortly after this merger, Imation announced a $200 million earnings write-off, which had a predictably negative effect on Imation's stock price. 309 F.3d at 1127. The employees filed a class action, claiming that Imation had induced them to maintain their employment with Cemax through the acquisition by misrepresenting the value of Imation stock and options in various respects, including concealment of the impending earnings write-off. *Id.* The Court found those claims to be barred by SLUSA. *Id.* at 1131.

Approximately one year after taking over Cemax, Imation sold Cemax to the Eastman Kodak Company. In connection with that latter sale, Imation gave the employees 30 days to exercise their vested options; any unvested options were deemed forfeited. *Id.* at 1127. Whether Imation could, consistent with the option contracts, require the employees to exercise their options on that timetable and to forfeit their unvested options depended on whether the sale of Cemax to Kodak constituted a "termination" of their employment as defined in the Imation contracts. *Id.* The alleged harm to the employees from Imation's acceleration of the exercise of certain options and forfeiture of others was distinct from any harm that the employees may have suffered from Imation's alleged misrepresentations or omissions that induced the

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alleged that he had contracted for a service but did not receive the kind of information for which he believed he was paying. *Green*, 279 F.3d at 598-99. The Eighth Circuit held that Green's claims were not "in connection with" the sale of a covered security and therefore were not barred by SLUSA. *Id.*

employees to accept Imation options in the first place. The Ninth Circuit held that those claims were not barred by SLUSA. *Id.*

Petitioner's claims are unlike those the Ninth Circuit found in *Falkowski* to be unaffected by SLUSA. *All* of the damages claimed by petitioner can be traced to the purchase by the putative class members of Class B, rather than Class A, shares. Petitioner does not claim that respondents made any error in calculating the commissions and fees due on the putative class members' Class B shares. Rather, all of the alleged harm and all of the alleged misconduct flows directly from the fact that petitioner and his fellow putative class members own what they consider to be the wrong share class. The alleged misrepresentation in the sale of those shares is at the heart of the types of claims that Congress intended for SLUSA to cover.

C. Petitioner's Challenge Collapses Into A Plea For Error Correction Of The Eleventh Circuit's Conclusion That All Of His Claims Involve Wrongdoing "In Connection With" The Sale Of A Covered Security

The Eleventh Circuit interpreted petitioner's claims as depending upon allegations of misstatements, omissions, or deception "in connection with" the sale of a covered security (and thus subject to dismissal under SLUSA). That determination is consistent with other courts' treatment of securities fraud claims that are dressed up in non-fraud language.

Indeed, the Eleventh Circuit expressly analogized the present case to *Dudek v. Prudential Securities, Inc.*, 295 F.3d 875 (8th Cir. 2002), in which the Eighth Circuit held that SLUSA barred a class action filed in state court alleging that the defendants improperly marketed tax-deferred annuities to accounts that already enjoyed tax-deferred status. Pet. App. A13 (citing *Dudek*, 295 F.3d at 877). The harm alleged was that the defendants charged higher fees for tax-deferral characteristics in the

annuities that their customers did not need. *Dudek*, 295 F.3d at 877. In their complaint, the *Dudek* plaintiffs carefully avoided express references to fraud, misrepresentation, or omission, and claimed that their cause of action was for excessive fees rather than for misconduct in connection with the sale of securities. *Id.* at 877-78. The Eighth Circuit rejected that argument, however, and found that SLUSA barred claims grounded in the misrepresentation or omission of material fact that the plaintiffs had been sold the wrong kind of security. *Id.* at 879.

Dudek exemplifies the principle that SLUSA bars state-law class actions that may seek to avoid pleading fraud explicitly but which nevertheless rely implicitly on allegations of misrepresentation, omission, or deception in connection with the sale of a covered security. *See also, e.g.*, *Zoren v. Genesis Energy, L.P.*, 195 F. Supp. 2d 598, 604 (D. Del. 2002) ("[C]ourts interpreting SLUSA assess preemption based upon whether the complaint read as a whole sets out fraudulent misconduct, regardless of the prayer for relief."). The Eleventh Circuit invoked that consistently applied principle and determined that SLUSA barred all of petitioner's claims. To the extent that petitioner challenges the Eleventh Circuit's application of that principle to the particular counts he pleaded, he seeks only fact-bound error correction and not the articulation of a legal rule that warrants this Court's plenary review.[3]

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[3] Petitioner makes (Pet. 10) a half-hearted effort to assert a conflict with *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), but the issue there concerned whether the class had been properly constituted, and not whether the claims that class members sought to pursue were legally valid.

II. THE CASE WAS REMOVABLE TO FEDERAL COURT UNDER SLUSA

A. The Text And Purposes Of SLUSA Support Removal

1. SLUSA provides that "[a]ny covered class action brought in any State court involving a covered security . . . shall be removable to the Federal district court for the district in which the action is pending." 15 U.S.C. § 77p(c). As the court below recognized, that provision supported respondents' removal of petitioner's state-court lawsuit. *See* Pet. App. A8 n.3.[4]

Because of the clarity of § 77p(c)'s text, the parties in the courts below joined issue only on whether petitioner's lawsuit was a "covered class action," and not whether § 77p(c) fails to mean what it plainly says. Indeed, petitioner all but conceded in his reply brief in the court of appeals that § 77p(c) supports removal jurisdiction. *See* Behlen C.A. Reply Br. 12 (discussing "the uniqueness of removal under SLUSA").

The Eleventh Circuit correctly rejected petitioner's contention "that his case was not removable, because it was not a 'covered class action.'" Pet. App. A9. Petitioner had based that argument on another subsection of SLUSA, § 77p(b), which states that "[n]o covered class action based upon the statutory or common law of any State or subdivision thereof may be *maintained* in any State or Federal Court." 15 U.S.C. § 77p(b) (emphasis added). Petitioner contended that "at the time of removal the case was not *maintained* as a class action, because the state court had not determined whether the case should proceed in a class-wide fashion." Pet. App. A10 (emphasis added). The Eleventh Circuit recognized that petitioner's argument

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[4] Petitioner asserts that "the Eleventh Circuit made utterly no mention of 15 U.S.C. § 77p(c)," Pet. 11, but that is plainly incorrect. In fact, the court's opinion quotes § 77p(c) in full. *See* Pet. App. A8 n.3.

> is based upon a misreading of the statute. The SLUSA does not require that an action be "maintained as a class action" before it can be removed; rather, it merely provides that no class action falling within the scope of its coverage can be maintained in a state or federal court, which means that dismissal of a "covered class action" is required.

Id. (citing *Prager v. Knight/Trimark Group, Inc.*, 124 F. Supp. 2d 229, 231 (D.N.J. 2000)).

SLUSA's definition of "covered class action" refers explicitly to actions in which "damages are sought on behalf of more than 50 persons or *prospective* class members, and questions of law or fact common to those persons or members of the *prospective* class . . . predominate," 15 U.S.C. §§ 77p(f)(2)(A)(i)(I), 78bb(f)(5)(B)(i)(I) (emphases added); *see also id.* §§ 77p(f)(2)(A)(i)(II), 78bb(f)(5)(B)(i)(II) (likewise referring to "members of the prospective class"). In view of these references, the Eleventh Circuit found the statutory language "clear" that "prospective class actions are removable to federal court even if the state court has not determined whether the action should go forward as a class action." Pet. App. A10.

2. Petitioner is unable to cite a single judicial decision holding, or even suggesting, that a prospective class action must be certified or otherwise "maintained" as a class before removal is proper under SLUSA. Rather, the opposite is true. SLUSA cases are routinely removed to federal court within only a few days or weeks after the filing of the class-action complaint in state court on the basis of the class allegations set forth in the complaint, and without any regard or reference to the class certification issue. *See, e.g., Feitelberg v. Merrill Lynch & Co.*, 234 F. Supp. 2d 1043 (N.D. Cal. 2002) (class action removed to federal court within 19 days after being filed in state court); *Hardy v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 01 Civ. 5973, 2001 WL 1524471 (S.D.N.Y. Nov. 30, 2001)

(class-action complaint removed to federal court a mere 10 days after being filed in state court).

Those holdings are consistent with Congress's purposes in enacting the PSLRA and SLUSA. Congress sought in SLUSA to facilitate rapid dismissal of frivolous securities fraud class actions brought in state court in contravention of the higher pleading standards in the PSLRA, but "[r]equiring [class] certification prior to removal would entail potentially lengthy and expensive pretrial practice and discovery in state court, regardless of the merits of the action." Pet. App. A11. As the court below recognized, "such a prospect is contrary to the stated objectives of the SLUSA." *Id.*

Accordingly, petitioner's argument that his lawsuit was not "maintained" as a "covered class action" within the meaning of SLUSA, and therefore falls outside that Act's removal and preemption provisions, is without merit.

B. Neither This Court's Impending Decision In *Breuer* Nor Its Recent Decision In *Holmes Group* Should Affect The Proper Disposition Of This Case

1. Petitioner appears to be seeking a grant, vacate, and remand order from this Court on the ostensible grounds that the decision below erred in light of recent case developments in this Court. *See* Pet. 10-14 (arguing that the petition should be held for *Breuer v. Jim's Concrete of Brevard, Inc.*, No. 02-337, or reversed in light of *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002)). Those arguments rest on a fundamental mischaracterization of what the Eleventh Circuit held below, as well as a misunderstanding of the issue presented in *Breuer* and this Court's holding in *Holmes Group*.

First, there is no basis for petitioner's assertion (Pet. 10) that the Eleventh Circuit's decision below depended on an interpretation of the general federal removal statute, 28 U.S.C. § 1441, rather than on the specific removal provisions of SLUSA. The court of appeals did not address the

language of the general removal statute, but rather rested its decision that removal was proper on SLUSA: "SLUSA preempts certain state law actions, allows for removal of state actions to federal court, and requires immediate dismissal of 'covered lawsuits.'" Pet. App. A9 (citing *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334, 1341 (11th Cir.), *cert. denied*, 123 S. Ct. 395 (2002)).[5]

Second, in view of that mischaracterization of the Eleventh Circuit's holding, petitioner proffers an argument that is irrelevant to the proper disposition of this case. Petitioner asserts that the general removal statute of 28 U.S.C. § 1441 may not be invoked in this context because "[t]he directive in SLUSA at 15 U.S.C. § 77p(b) that '[n]o covered class action based on the statutory or common law of any state . . . may be maintained in state or federal court' itself provides no basis for finding that the action may be removed as provided in § 1441." Pet. 10 (second alteration and ellipsis in original). At best, however, that question is academic, in light of SLUSA's explicit removal provision in § 77p(c). Moreover, even if a conceivable basis existed for a court to inquire into the applicability of § 1441's general removal provisions in a SLUSA case (rather than simply apply SLUSA's specific removal provision in § 77p(c)), this case would present a poor vehicle for this Court to address that question, because petitioner did not raise it below and the Eleventh Circuit did not address the issue on its own.

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[5] In *Riley*, the trustees of a profit sharing plan brought a class action in state court against the investment adviser of a registered investment company, claiming violations of state securities and unfair trade practices laws based on "material Misrepresentations and Omissions [that] induced the Plaintiffs and other Class members to *purchase and retain* shares of the Growth Fund." 292 F.3d at 1345 (alterations and emphasis in original; internal quotation marks omitted). The Eleventh Circuit held that the case was a "covered class action," *id.*, and was therefore properly removed to federal court and dismissed pursuant to SLUSA, *id.* at 1341.

2. Having artificially focused the petition on a question neither raised nor decided below, petitioner then seeks to have this case held for the Court's impending decision in *Breuer*. There is no colorable reason to hold the current petition for *Breuer*, which presents an unrelated question about removal of actions brought under the Fair Labor Standards Act ("FLSA").

The federal removal statute, 28 U.S.C. § 1441(a), provides that, "[e]xcept as otherwise expressly provided by Act of Congress," any action in state court of which the federal district courts also have jurisdiction may be removed to federal district court. The FLSA provides that an action "may be maintained against any employer . . . in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b). The question presented in *Breuer* is whether an FLSA action filed in state court is subject to removal under § 1441(a). The argument being made against removal in *Breuer* is that the FLSA's language providing that an action may be "maintained" in state court amounts to an "express" prohibition on removal under § 1441. *See* Pet. Br. at 6, No. 02-337 (arguing that "[t]he phrase 'may be maintained' [in the FLSA] should fairly be understood to mean that an employee who has brought an FLSA action in state court may in that court continue that action until final judgment").

This Court's answer to that question has no bearing on the proper disposition of petitioner's case, which depends *solely* upon whether his suit is a "covered class action" within the meaning of 15 U.S.C. § 77p(b) and (c) – which it unquestionably is. *See* pp. 14-16, *supra*. Indeed, even if the decision below somehow could be read to rest on a construction of § 1441, *Breuer* would be irrelevant for the additional reason that the federal securities laws contain their own "express[] provi[sion] by Act of Congress" codified at § 77v that limits the applicability of § 1441. Whether the FLSA also has such a provision – the question raised in *Breuer* – simply has no bearing on this case.

Petitioner argues that Congress's use of the word "maintained" in both the FLSA and SLUSA suggests that *Breuer* will nonetheless be instructive to the Court's disposition of the petition. But even that similarity does not justify holding this petition until *Breuer* is decided. Petitioner's theory is that the Eleventh Circuit found removal jurisdiction based exclusively on Congress's complete preemption of state law in the field of securities class actions. *See* Pet. 12 ("Had the Eleventh Circuit not found that the 'complete pre-emption' doctrine controlled here, it would have reversed the district court's finding of removal jurisdiction."). Although petitioner asserts that *Breuer* will shed light on whether the use of the word "maintained" in the FLSA "intimate[s] that it is concerned with the issue of removal," Pet. 11, the issue in *Breuer* does not concern preemption at all, but rather whether the FLSA's provision authorizing suits to be "maintained" in both federal and state courts provides a basis for removal. Accordingly, there is no reason to think that anything this Court might say in *Breuer* about the word "maintained" under the FLSA would affect a court's analysis of SLUSA.

In any event, it is noteworthy that even the Ninth Circuit – erroneously asserted by petitioner to be in conflict with the Eleventh Circuit below – agrees that SLUSA completely preempts claims within its coverage. *See Falkowski*, 309 F.3d at 1128 ("SLUSA provides for just such complete preemption.")

3. Finally, petitioner cites *Holmes Group* for the proposition that "a perceived congressional purpose to promote uniformity in a field of law, as opposed to a text that requires it, does not justify a finding of 'complete preemption.'" Pet. 13. Petitioner's reliance on *Holmes Group* is misplaced.

First, as noted above, the decision below does *not* rest on a finding of complete preemption. Rather, it flows from the Eleventh Circuit's plainly correct determination that petitioner's lawsuit is a "covered class action" subject to removal under § 77p(c) and to dismissal under § 77p(b).

Second, the Eleventh Circuit did not base its decision merely on its perception of Congress's purposes. Instead, the court relied chiefly on the statutory text. The court ruled that "it is clear from the statutory language that prospective class actions are removable to federal court even if the state court has not determined whether the action should go forward as a class action," and that petitioner's contrary argument was based on a "misreading of the statute." Pet. App. A10.

Finally, the holding of *Holmes Group* – that appeals involving aspects of patents do not always implicate the Federal Circuit's exclusive jurisdiction over patent appeals – is quite far afield from the SLUSA issues presented here. *See* 535 U.S. at 829-30.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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